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SUBJECT: UNCITRAL WORKING GROUP REVISES MODEL LAW ON PROCUREMENT

SUMMARY

¶1. (U) The United Nations Commission on International Trade Law (UNCITRAL) Working Group I (Procurement) met in Vienna September 8-12, 2008 to discuss proposed reforms to the UNCITRAL model procurement law. For the past several years, the Working Group on Procurement has been engaged in an effort to update its 1994 Model Law on Procurement of Goods, Construction and Services and its accompanying Guide to Enactment to reflect new practices and technological developments, in particular those resulting from the use of electronic communications in public procurement. [Note: Further information on this initiative is available through the UNCITRAL website, at <http://www.uncitral.org>.] END SUMMARY.

¶2. (U) The U.S. delegation was led by Michael Dennis from L/PIL. The delegation had two advisers: Don Wallace, Jr., of the International Law Institute and the Georgetown University Law Center, and Christopher Yukins, co-director of the government contracts program at the George Washington University Law School. Both advisers have been involved in this UNCITRAL reform initiative since it was launched formally in 2004, and Professor Wallace was directly involved in the drafting of the original UNCITRAL model procurement law, which was published (in its current form) in 1994.

REMEDIES

¶3. (U) The Working Group meeting began with a discussion of "remedies," or what we call "bid protests" in the United States. The United States has a long tradition of allowing vendor challenges to procurement decisions. That tradition has been extended to the UN Convention Against Corruption, and the World Trade Organization (WTO)'s multilateral Government Procurement Agreement (GPA). Both the Convention and the Agreement, with the strong support of the United States, call for effective remedies systems in procurement.

¶4. (U) This growing international consensus behind effective remedies systems made it important to ensure that the UNCITRAL model procurement law also provides for effective remedies systems. The working group discussed this issue over two days, and concluded that remedies under the UNCITRAL model law should be strengthened substantially. The Working Group expects that the UNCITRAL model law, as revised, will provide for remedies systems that are as good, or better, than those called for by the WTO GPA, and that remedies systems implemented under the UNCITRAL model law will easily meet the minimum requirements of the UN Convention Against Corruption.

15. (U) In the third and fourth days of the session, the Working Group discussed "frameworks" agreements (known in the United States as "indefinite-delivery/indefinite-quantity" contracts or "catalogue" contracts). Our federal procurement law has addressed these contracts in detail since 1994, and the European procurement directives, since 2004, have also endorsed them. [Comment: The UNCITRAL working group thus gives the United States and some of its main trading partners an opportunity to discuss the issues presented by these types of contracts, before they emerge in the much more contentious GPA negotiations.]

16. (U) The two days of discussion followed on many previous working group and expert meetings regarding framework agreements. Ultimately, the Working Group endorsed three basic types of framework agreements:

- * Type I: "Closed" framework agreements, with a small number of awardees, who, once the master agreements are in place, can be awarded orders based on prices and conditions set forth in the original master agreement. These types of agreements are very rare in the U.S. federal system, because they put comparatively little competitive pressure on the awardee contractors.

- * Type II: "Closed" framework agreements that call for a second round of competition: with the master agreements in place, once a customer agency has a need, the agency may call for a "mini-competition" among those contractors that hold master agreements to serve the agency. These types of agreements are

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common in the U.S. federal system.

- * Type III: "Open" framework agreements, which operate much like Type II agreements, but which are presumptively open, for an indefinite period, to any eligible vendor. The U.S. General Services Administration (GSA) sponsors a contract type, the "Multiple Award Schedule" (MAS) which uses this model. Thousands of contractors are members of the GSA MAS contracts. The European Commission has published a directive on procurement which contemplates this type of framework agreement, among others; in practice, the U.S. experience with these types of agreements is much more robust.

CONFLICTS OF INTEREST IN PROCUREMENT

17. (U) On the last day of the meeting, the Working Group discussed potential reforms to check conflicts of interest in procurement. Our concerns were the following:

- * The UN Convention Against Corruption, which has been broadly adopted, calls in Article 9 for procurement rules to check conflicts of interest.

- * Broad international interest in the UN Convention Against Corruption may mean it serves as a catalyst for the next round of international improvements in procurement.

- * Because standards for conflicts of interest can vary enormously between legal cultures, it would be difficult to establish international standards for conflicts of ethics in procurement. We have urged the Working Group, therefore, that the current reform initiative should identify and support ways to develop systems for mitigating conflicts of interest -- systems such as regular reports, and whistleblower complaints.

18. (U) The Working Group agreed that the Model Law should include provisions setting out the relevant principles and that the detailed explanations and considerations would be set out in the Guide to Enactment.

SCHEDULE OF FUTURE WORK

¶9. (U) The Working Group also agreed to a schedule for future work, deciding that a complete version of the revised model law would be presented to the Working Group at its February 2009 session in New York. The Working Group further agreed that its aim was to submit the revised model law to the Commission at its 42nd session in June 2009 in Vienna. The Secretariat indicated that it lacked resources to prepare a draft of the legislative guide prior to the February session of the Working Group, but that it would be able to provide a draft of the Guide for the commission meeting in June 2009. The Working Group decided that, time permitting, the Commission should also review the draft legislative guide at its June 2009 session.

WORKING METHODS AND RULES OF PROCEDURE

¶10. (SBU) In discussions this week both with French delegates and the Secretariat, it appears that the French objections to UNCITRAL's working methods have abated for now. The French delegation told us that they are happy with the acting Secretary's handling of NGOs, in particular, and would not raise the issue of working methods and rules of procedure during the working group session. We assess that this change in attitude reflects both perceived improvements in the work of the Secretariat, as well as reticence to be critical of the Secretariat when acting Secretary Renaud Sorieul, a French national, is on the short list to occupy the vacant Secretary position. The current Deputy and current acting Secretary, Mr. Sorieul, is one of three finalists for the position that Slovenian Jernej Sekolec left in July. A decision on the vacancy is imminent and will be made in New York.

SCHULTE